

1  
2  
3  
4  
5  
6  
7  
8 IN THE UNITED STATES DISTRICT COURT  
9 FOR THE DISTRICT OF OREGON

10 DUSTY WALTERS

Civil No. 04-1490-AA  
OPINION AND ORDER

11 Plaintiff,

12 vs.

13 JO ANNE B. BARNHART,  
Commissioner of Social Security,

14 Defendant.

15 \_\_\_\_\_  
16 Rory Linerud  
17 Linerud Law Firm  
18 PO Box 1105  
19 Salem, Oregon 97308  
20 Attorney for plaintiff

21 Karin Immergut  
22 United States Attorney  
23 District of Oregon  
24 Neil Evans  
25 Assistant United States Attorney  
26 1000 S.W. Third Avenue  
27 Portland, Oregon 97204-2902

28 David R. Johnson  
Special Assistant United States Attorney  
Social Security Administration  
701 Fifth Avenue, Suite 2900 M/S 901  
Seattle, Washington 98104-7075  
Attorneys for defendant

26 ///

27 ///

1 AIKEN, Judge:

2 Claimant, Dusty Walters, brings this action pursuant to the  
3 Social Security Act, 42 U.S.C. § 405(g), to obtain judicial  
4 review of a final decision of the Commissioner. The Commissioner  
5 denied the plaintiff's application for Disability Insurance  
6 Benefits (DIB) under Title II of the Social Security Act, 42  
7 U.S.C. §§ 401-33. For the reasons set forth below, the  
8 Commissioner's decision is affirmed.

9 **PROCEDURAL BACKGROUND**

10 The plaintiff filed his application for DIB on April 12,  
11 2001. Tr. 54-56. He alleged disability since November 1, 1999,  
12 based on hearing voices. Tr. 54, 65. His application was denied  
13 initially and upon reconsideration. Tr. 38-42, 45-47. An  
14 administrative law judge (ALJ) conducted a hearing on March 20,  
15 2004, where he heard testimony from the plaintiff, who was  
16 represented by an attorney, and Dr. Dragovich, a medical expert.  
17 Tr. 277-304.

18 On May 26, 2004, the ALJ issued a decision finding that the  
19 plaintiff had engaged in substantial gainful activity since  
20 October 29, 2001, and that prior to that date the plaintiff did  
21 not have a severe impairment within the meaning of the  
22 regulations. Tr. 14-20. Therefore, he found the plaintiff not  
23 disabled within the meaning of the Social Security Act. Tr. 20.  
24 The Appeals Council denied the plaintiff's request for review on  
25 August 23, 2004, making the ALJ's decision the final decision of  
26 the Commissioner. See 20 C.F.R. §§ 404.981, 422.210.

27 ///

28 ///

1

2

## 3

4

5

6

1 Yuckert, 482 U.S. 137, 140 (1987); 20 C.F.R. §§ 404.1502,  
2 416.920. First the Secretary determines whether a claimant is  
3 engaged in "substantial gainful activity." If so, the claimant  
4 is not disabled. Yuckert, 482 U.S. at 140; 20 C.F.R.  
5 §§ 404.1520(b), 416.920(b).

6 In step two the Secretary determines whether the claimant  
7 has a "medically severe impairment or combination of  
8 impairments." Yuckert, 482 U.S. at 140-41; see 20 C.F.R.  
9 §§ 404.1520(c), 416.920(c). If not, the claimant is not  
10 disabled.

11 In step three the Secretary determines whether the  
12 impairment meets or equals "one of a number of listed impairments  
13 that the Secretary acknowledges are so severe as to preclude  
14 substantial gainful activity." Id.; see 20 C.F.R.  
15 §§ 404.1520(d), 416.920(d). If so, the claimant is conclusively  
16 presumed disabled; if not, the Secretary proceeds to step four.  
17 Yuckert, 482 U.S. at 141.

18 In step four the Secretary determines whether the claimant  
19 can still perform "past relevant work." 20 C.F.R.  
20 §§ 404.1520(e), 416.920(e). If the claimant can work, he is not  
21 disabled. If he cannot perform past relevant work, the burden  
22 shifts to the Secretary.

23 In step five, the Secretary must establish that the  
24 claimant can perform other work. Yuckert, 482 U.S. at 141-42;  
25 see 20 C.F.R. §§ 404.1520(e) & (f), 416.920(e) & (f). If the  
26 Secretary meets this burden and proves that the claimant is able  
27 to perform other work which exists in the national economy, he is  
28 not disabled. 20 C.F.R. §§ 404.1566, 416.966.

1 In the plaintiff's case, the ALJ found at step one that the  
2 plaintiff had engaged in substantial gainful activity since  
3 October 29, 2001. Tr. 15. Thus, the ALJ found the plaintiff not  
4 disabled since that date. Tr. 15. The plaintiff does not  
5 disagree with this finding.

6 At step two, the ALJ found that between the plaintiff's  
7 alleged date of disability onset and October 28, 2001, the  
8 plaintiff had an organic brain syndrome impairment that was not  
9 severe as that term is used by the regulations. Tr. 19. Because  
10 the plaintiff was found not disabled the ALJ stopped the  
11 sequential evaluation process. The plaintiff disagrees with the  
12 ALJ's assessment of the severity of his impairments at step two.

13 The plaintiff alleges that the ALJ erred in determining  
14 that his impairment was not severe by improperly rejecting the  
15 opinions of the DDS physicians.

#### 16 **DISCUSSION**

17 The plaintiff argues that the ALJ erred in finding his  
18 impairment not severe by improperly rejecting the opinions of  
19 Drs. Henry and Rethinger on the Residual Functional Capacity  
20 (RFC) assessments. The defendant argues that the ALJ's severity  
21 finding was supported by substantial evidence and free of legal  
22 error.

23 Drs. Henry and Rethinger, DDS physicians, first assessed  
24 the plaintiff on the Psychiatric Review Technique Form (PRTF).  
25 Tr. 212, 250. The doctors opined that the plaintiff's mental  
26 impairments caused only mild limitations. Tr. 212, 250. The  
27 categories of limitation the doctors found to be mild came from  
28 the "four broad functional areas [that] rate the degree of your

1 functional limitation[.]” See 20 C.F.R. 404.1520a(c)(3). This  
2 form is used to rate severity of mental impairments at steps two  
3 and three of the sequential evaluation process. SSR 96-8p at \*4.  
4 Mild mental limitations are generally considered not severe. 20  
5 C.F.R. 404.1520a(d)(1).

6 However, the doctors also assessed the plaintiff with  
7 moderate workplace limitations on the RFC assessment forms. Tr.  
8 218-219, 236-237. The RFC finding comes just prior to steps four  
9 and five of the sequential evaluation process, and requires  
10 consideration of an “expanded list of work related capacities[.]”  
11 20 C.F.R. Pt. 404 Subpt. P App. 1 at 12.00A.

12 The plaintiff attributes the finding of some moderate  
13 limitations on the RFC assessment forms as evidence that his  
14 mental impairments were severe. An impairment assessed as mild  
15 in the areas of the PRTF will be found to be severe if it causes  
16 more than a minimal limitation in the ability to do basic work  
17 activities in the areas of the RFC assessment. “Basic work  
18 activities” are defined as “the abilities and aptitudes necessary  
19 to do most jobs.” 20 C.F.R. §404.1521(b). In order for an  
20 impairment to be nonsevere, it must have no more than a minimal  
21 effect on an individual’s ability to perform basic work  
22 activities. SSR 85-28 at \*3.

23 Basic work activities do not include every work related  
24 limitation. Basic work activities include handling “simple  
25 instructions,” but not handling detailed instructions. 20 C.F.R.  
26 §404.1521(b)(3). The plaintiff was not limited in his ability to  
27 understand, remember, and carry out simple instructions;  
28 therefore he was not impaired as to this basic work activity.

1 Tr. 218, 236. Basic work activities also do not generally  
2 include interacting with the general public, which was the only  
3 other limitation assessed. Tr. 219, 237. See 20 C.F.R.  
4 §404.1521(b). Because the limitations assessed on the RFC form  
5 did not indicate more than a minimal effect on the plaintiff's  
6 ability to perform basic work activities, the ALJ was correct in  
7 finding that the plaintiff's impairments were not severe.

8 In finding that the plaintiff's impairments were not  
9 severe, the ALJ rejected the possibility that Drs. Henry and  
10 Rethinger meant to indicate that more than mild limitations  
11 existed. The plaintiff argues that the ALJ erred in rejecting  
12 the moderate limitations assessed on the RFC forms by these  
13 doctors. However, if these assessments are to be interpreted in  
14 the manner that the plaintiff asserts, the doctors' opinions are  
15 internally inconsistent. The ALJ is responsible for determining  
16 credibility, resolving conflicts in medical testimony, and  
17 resolving ambiguities." Edlund v. Massanari, 253 F.3d 1152, 1156  
18 (9<sup>th</sup> Cir. 2001)(internal citation omitted). The ALJ properly  
19 found that to the extent that the limitations on the RFC  
20 assessments expressed greater than mild limitations, they  
21 contradicted the DDS physicians' assessments on the PRTF.

22 Furthermore, the ALJ's conclusions were supported by a  
23 logical reading of the record as a whole. Dr Dragovich, who  
24 testified at the hearing, also commented on the four broad  
25 categories of functioning: the activities of daily living; social  
26 functioning; concentration, persistence, and pace; and  
27 decompensation, and found that the plaintiff had at most mild  
28 limitations in these areas. Tr. 300-302. She agreed that the

1 plaintiff's impairment was not severe. Tr. 301. The ALJ  
2 properly stopped the sequential evaluation process at step two  
3 based on the mild limitations assessed by the DDS physicians and  
4 Dr. Dragovich.

5 The plaintiff also points out that the ALJ incorrectly  
6 stated during the hearing that Drs. Rethinger and Henry had  
7 opined that the plaintiff had no medically determinable  
8 impairment. Dr. Dragovich corrected the ALJ and testified that  
9 a medically determinable impairment did exist, but that the  
10 limitations caused by the impairment were not severe. The ALJ's  
11 misstatement was corrected by the doctor and was not a basis for  
12 his decision as to whether step two was satisfied. To satisfy  
13 step two, the plaintiff must show that his impairment is both  
14 medically determinable and is severe. The ALJ accepted Dr.  
15 Dragovich's testimony and found that a medically determinable  
16 impairment (a "drug-induced organic brain syndrome") existed, but  
17 that the limitations caused by this impairment were not severe;  
18 therefore, step two of the sequential evaluation process was not  
19 satisfied.

#### 20 **CONCLUSION**

21 The Commissioner's decision is based on substantial  
22 evidence, and is therefore affirmed.

23 IT IS SO ORDERED.

24 Dated this 22 day of September 2005.

26 /s/ Ann Aiken

27 Ann Aiken

28 United States District Judge